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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 924

MARY MacFADDEN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	3
1. The facts as found by the Tax Court	3
2. The facts established at the hearing	5
3. The facts pertaining to the New Jersey litigation	6
REASONS FOR GRANTING THE WRIT	7
A. The Court of Appeals erred in holding that the agreement of April 7, 1932 was incident to a divorce within the meaning of Section 22(k) and that payments thereunder made to the petitioner were taxable to her for the calendar years herein involved	7
B. The holding of the Court of Appeals, affirming the decision of the Tax Court, fails to take cognizance of, or pass upon, the law of the State of New Jersey enunciated in an intervening decision of the New Jersey Superior Court and raised by the petitioner in oral argument. The holding of the New Jersey court in a litigated, adversary proceeding, that the agreement herein involved did not provide "alimony" was binding upon the court below	12
CONCLUSION	16

PAGE

Appendix A—Opinion Below 17

Appendix B—Judgment Below 22

Appendix C—Statute Involved 23

Appendix D—Separation Agreement of April 7, 1932 24

Trust Agreement of April 7, 1932 32

Appendix E—Opinion of the Superior Court of New Jersey, Chancery Division 38

Appendix F—Opinion of the Superior Court of New Jersey, Appellate Division 41

CASES CITED.

Blair v. *Commissioner*, 300 U. S. 5 (1937) 14

Commissioner v. *Miller*, 199 F. 2d 597 (9th Cir. 1952) 11
Commissioner v. *Moses*, 214 F. 2d 912 (2d Cir. 1954) 11
Cox v. *Commissioner*, 176 F. 2d 226 (3rd Cir. 1949) 10

Erie Railroad Company v. *Tompkins*, 304 U. S. 64 (1938) 12, 13

Feinberg v. *Commissioner*, 198 F. 2d 260 (3rd Cir. 1952) 10, 11
Fidelity Union Trust Company v. *Field*, 311 U. S. 169 (1940) 15

Holt v. *Commissioner*, 23 T. C. 469 (1954), revd. 226 F. 2d 757 (2d Cir. 1956), cert. den. 350 U. S. 982 (1956) 10
Huddleston v. *Dwyer*, 322 U. S. 232 (1944) 14

King v. *Order of United Commercial Travelers of America*, 333 U. S. 153 (1948) 15

Lerner v. *Commissioner*, 195 F. 2d 296 (2d Cir. 1952) 11

PAGE

MacFadden v. *MacFadden*, 46 N. J. Super. 242 (Ch. 1957); affd. N. J. Super. Ct. (App. Div. 1958), Docket No. A-56-57 ..... 2, 6, 14

Moore v. *Illinois Central Railroad*, 312 U. S. 630 (1941) 15

Morgan v. *Commissioner*, 309 U. S. 78 (1940) 15

Rosenthal v. *New York Life Insurance Co.*, 304 U. S. 263 (1938) 15, 16

Ruhlin v. *New York Life Insurance Co.*, 304 U. S. 202 (1938) 15

Stoner v. *New York Life Insurance Co.*, 311 U. S. 464 (1940) 13

Swift v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842) 13

Vandenbark v. *Owens-Illinois Glass Company*, 311 U. S. 538 (1941) 16

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223 (1940) 13

UNITED STATES STATUTES.

Internal Revenue Code of 1939, Section 22(k) 2, 3, 7, 8, 11, 12, 14

Internal Revenue Code of 1954, Section 7482(a) 2

Revenue Act of 1942 8

Title 28, U. S. C., Section 1254 (1) 2

NEW JERSEY STATUTES.

N. J. S. 2A:34-8 14

N. J. S. 2A:34-23 et seq. 14

TEXT.

Moore's Commentary on the United States Judicial Code, p. 309, Matthew Bender & Co., New York, New York (1949) 14

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MARY MACFADDEN,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mary MacFadden, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 18, 1957.

Opinions Below.

The findings of fact and memorandum opinion of the Tax Court of the United States were promulgated on December 31, 1956, in Docket No. 41202, T. C. Memo. 1956-287, and are printed at pp. 29a-39a of the Appendix. The memo-

randum opinion of the Tax Court is not officially reported. The opinion of the United States Court of Appeals for the Third Circuit is reported at 250 F. 2d 545 and is appended hereto as Appendix "A".

Jurisdiction.

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 18, 1957. A copy thereof is appended hereto as Appendix "B". An application for an extension of time within which to file a petition for a writ of certiorari in this cause was filed with this court on March 17, 1958. Said application was granted by this Court on March 17, 1958, extending the time to and including April 15, 1958 within which to file said petition for a writ of certiorari in this cause.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) and Section 7482(a) of the Internal Revenue Code of 1954.

Questions Presented.

1. Are certain payments received by petitioner pursuant to a separation agreement executed in 1932, incident to a decree of divorce in 1946 within the meaning of Section 22(k) of the Internal Revenue Code of 1939, so that such payments were taxable to her as alimony under said section?

2. Inasmuch as the New Jersey Superior Court*, in a litigated, adversary proceeding, has held that such agree-

* Affirmed by Appellate Division of the Superior Court of New Jersey on March 25, 1958 in Docket No. A-56-57, not officially reported as yet.

ment did not provide "alimony," was the United States Court of Appeals for the Third Circuit free to disregard the law of New Jersey and decide that such agreement provided for alimony?

Statute Involved.

The statute involved is Section 22(k) of the Internal Revenue Code of 1939 which is set forth in Appendix "C", appended hereto.

Statement.

This proceeding involves a petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Third Circuit, which affirmed a decision of the Tax Court of the United States, upholding the determination by the Commissioner of Internal Revenue that deficiencies exist in the income tax liability of petitioner for the calendar years 1946 to 1950, as follows (App. 30a, 39a):

1946	$6,553.27
1947	6,446.77
1948	5,113.87
1949	5,288.58
1950	5,439.59

1.

1. The facts as found by the Tax Court are as follows:

At all times herein involved, the petitioner was an individual (Stip. of Facts, Par. 1, App. 30a). She resides at 406 Linden Avenue, Englewood, New Jersey (App. 34a)

and she filed her income tax returns for the taxable years herein involved with the Collector of Internal Revenue for the Fifth District of New Jersey (Stip. of Facts, pars. 1 and 4; Exs. 1-A through 5-E; App. 30a).

The petitioner and Bernarr MacFadden were married in 1913 (Stip. of Facts, Par. 6, App. 31a). Seven children were born of the marriage (Ex. 10-J, Par. 4).

Petitioner and her said husband entered into a separation agreement on April 7, 1932 (Ex. 6-F; App. 31a; App. "D"). Among other things, said agreement provided that petitioner's husband would create an irrevocable trust for the petitioner (Ex. 6-F, App. 31a; App. "D"). The principal of said trust was to consist of 2,500 shares of the preferred stock of MacFadden Publications, Inc. (Ex. 6-F, App. 31a; App. "D"). On April 7, 1932 such trust was created (Ex. 7-G, App. 32a; App. "D").

Almost eleven years after the execution of said agreements, on January 27, 1943, petitioner's husband instituted an action for divorce in the State of Florida (Stip. of Facts, Par. 8, App. 32a). A final decree of divorce was granted to both parties on January 9, 1946 (Stip. of Facts, Par. 9; Ex. 11-K, App. 33a).

The trust formed pursuant to the said separation agreement had distributable trust income for the taxable years herein involved as follows:

1946	$13,030.64
1947	13,002.82
1948	11,954.60
1949	12,060.36
1950	10,929.20 (App. 33a)

Petitioner's husband made supplemental payments to the trustee, City Bank Farmers Trust Company, for the taxable years herein involved as follows:

1946	$1,834.68
1947	1,997.18
1948	3,045.40
1949	3,007.14
1950	4,070.80 (App. 33a)

The petitioner received from the said trustee the amount of $13,500.00 in each of the taxable years herein involved (App.34a). Said trustee paid to the Bernarr MacFadden Foundation, toward the upkeep of petitioner's home, owned by the said Bernarr MacFadden Foundation, the amount of $1,500.00 in each of the taxable years herein involved (App. 34a).

2.

2. The facts established at the hearing of the instant cause but with respect to which the Tax Court omitted to make findings, relate to the intent of the parties as to the dissolution of their marriage.

The uncontroverted testimony of the petitioner was that at the time of the execution of said separation and trust agreements there were no discussions concerning a divorce, and a divorce had not been contemplated by the parties (App. 14a; Ex. 6-F). Indeed, there was no discussion of legal proceedings of any kind or nature between the petitioner and her husband (App. 14a). The agreement clearly expresses the intent of the parties not to dissolve their marriage and petitioner would have lost all benefits under said agreement if she had instituted any legal proceedings against her husband (App. "D", par. 9 of the Separation Agreement).

3. The facts pertaining to the New Jersey litigation are as follows:

On August 28, 1957, the Superior Court of New Jersey, Chancery Division, rendered its opinion in the case of Mary MacFadden, plaintiff, vs. Bernarr MacFadden et als., defendants. The opinion is reported in 46 N. J. Super. 242 (Ch. 1957) (App. "E"). The decision therein was rendered subsequent to the trial in the Tax Court in the instant cause and was not promulgated in time for inclusion in petitioner's brief in the Court below. However, in oral argument before the Court below on November 19, 1957, counsel for petitioner directed the attention of the Court to said New Jersey decision and supplied the Court with the above official citation thereof.

It was strenuously argued by counsel for petitioner below that the construction and interpretation of the same separation agreement herein involved, rendered by the New Jersey Court to the effect that it was not alimony, was binding upon the Court of Appeals. The opinion of the Court of Appeals was handed down on December 18, 1957 and affirmed the decision of the Tax Court. In its said opinion the Court of Appeals neglected and omitted to make any reference to the intervening decision of the New Jersey Court. The judgment of the Court of Appeals upheld the Tax Court's determination that the payments in controversy constituted alimony and in so doing held contrary to the applicable state law declared by the New Jersey Court.

The aforesaid judgment of the Superior Court, Chancery Division, was affirmed by the Appellate Division of the Superior Court of New Jersey on March 25, 1958 in Docket No. A-56-57, not yet officially reported (App. "F").

Reasons for Granting the Writ.

1. The United States Court of Appeals for the Third Circuit has decided an important question of federal law which has not been, but should be, settled by this court. The Court of Appeals, in affirming the Tax Court, held that payments made to petitioner, under a written instrument executed ten years before Section 22(k) was passed and fourteen years prior to a final decree of divorce, were "incident" to such divorce within the meaning of Section 22(k). The question presented is of great importance in the administration of the federal tax system and affects the tax liability of a great number of taxpayers.

2. The decision of the United States Court of Appeals for the Third Circuit completely disregards the law of the State of New Jersey and is in direct conflict with the decision of the Superior Court of New Jersey concerning the problem of state law presented.

Following is a brief presentation of the arguments in support of the petitioner's contention that the decision of the United States Court of Appeals for the Third Circuit is erroneous:

A. The Court of Appeals erred in holding that the agreement of April 7, 1932 was incident to a divorce within the meaning of Section 22(k) and that payments thereunder made to the petitioner were taxable to her for the calendar years herein involved.

Payments to petitioner pursuant to the separation agreement executed in 1932, were not taxable to the petitioner, as alimony, subsequent to the decree of divorce

granted in 1946, inasmuch as such payments were not made under a written agreement "incident" to such divorce.

Section 22(k) of the Internal Revenue Code of 1939, applicable to the taxable years herein involved, does not apply to the payments, herein in question, made to the petitioner. The Commissioner of Internal Revenue, the Tax Court and the Court of Appeals have erroneously extended the meaning of the phrase "incident to such divorce" contained in Section 22(k) to render the payments under said agreement taxable income to the petitioner.

Congress, in enacting Section 22(k), clearly indicated that it did not intend to tax all payments made by husband to wife subsequent to a decree of divorce. Its express intent was to make taxable to the wife only those payments that were (1) periodic (2) imposed because of marital or family relationship (3) and imposed by a decree or under a written instrument incident to such divorce (App. "C").

The questioned payments were not imposed by a decree of divorce or under a written instrument "incident" to the divorce finally obtained. Such payments were made under and by virtue of a written agreement entered into by and between the petitioner and her husband on April 7, 1932 (Ex. 6-F; App. "D"). Said agreement was executed almost fourteen years prior to the granting of a decree of divorce dated January 9, 1946, in an action instituted by Bernarr MacFadden subsequent to the enactment of Section 22(k) in the Revenue Act of 1942.

Said separation agreement was entered into without the intent on behalf of either party to dissolve the marriage. To the contrary, the agreement expressly bespeaks the in-

tent of the parties not to dissolve their marriage. The petitioner expressly agreed that:

> "* * * she will at no time take any step or action which would hold the said party of the first part up to public ridicule, contempt or unfavorable notoriety and publicity, and the domestic unhappiness of the parties hereto shall be kept between the parties hereto * * * " (App. "D", para. 9 of Separation Agreement).

The Separation agreement further provided in paragraph 9 thereof:

> "* * * that if it be judicially determined that the party of the second part has violated this provision (paragraph 9), then the party of the first part may at his election revoke the aforementioned trust and in such event upon presentation of such judicial proof to the City Bank Farmers Trust Company, the said Trust Company shall thereupon pay over the corpus of said trust fund to the Bernarr MacFadden Foundation, Inc., or anyone else whom the party of the first part will designate. The judicial determination required under this provision shall be the determination of a Court of Record of the State of New Jersey as affirmed (if any appeal be taken) by the higher Court of Appellate Jurisdiction." (Ex. 6-F; App. "D").

Petitioner agreed, at the dictate of her husband, not to institute any legal proceedings against him with respect to the marriage. If petitioner had commenced legal proceedings, she would have lost all benefits under the said agreement. The substance of the agreement clearly eclipses the form of the agreement found by the Tax Court and relied upon by the Court of Appeals in its holding.

The uncontroverted testimony of the petitioner was that, at the time of the execution of the separation and trust agreements, no discussions took place between her and her husband concerning a divorce and no divorce was contemplated by the parties (App. 14a). She further testified that no legal proceedings of any kind or nature were contemplated by the parties to said agreement (App. 14a). Under the foregoing circumstances, it appears to be obvious that the separation agreement could not have been "incident" to the divorce.

The divorce decree granted by the Circuit Court of the State of Florida in 1946, takes note of the separation agreement, but makes no adjudication with respect thereto and the same is not incorporated in the decree (Ex. 11-K).

The United States Court of Appeals for the Third Circuit has held, with respect to the application of Section 22(k) that in order for a separation agreement to be incident to such divorce it be a "part of the package of such divorce." *Cox* v. *Commissioner,* 176 F. 2d 226, 229 (3rd Cir. 1949); *Feinberg* v. *Commissioner,* 198 F. 2d 260, 263 (3rd Cir. 1952).

The Tax Court has held that:

> "* * * we must respectfully adhere to the position previously taken by the cases decided in the Tax Court. 'Not every agreement which is followed by a divorce is "incident to" the divorce within the meaning and intent of section 22(k). * * * the chief difficulty has been to determine from the facts in each individual case whether the necessary connection between the two exists.' " *Harold Holt,* 23 T. C. 469 (1954), revd. 226 F. 2d 757 (2d Cir. 1956), cert. den. 350 U. S. 982 (1956).

The legislative purpose of the Congress in promulgating Section 22(k) of the Internal Revenue Code of 1939 would be defeated if every agreement for support made by husband and wife were to be held incident to a divorce solely because it survived the divorce. Moreover, such legislative purpose would be frustrated if separation agreements such as herein involved were determined to be incident to the divorce irrespective of the actual intent of the parties and irrespective of the passage of time between the execution of the agreement and the granting of a decree of divorce.

In its opinion below the Court of Appeals found the following cases to be helpful, among others: *Lerner* v. *Commissioner,* 195 F. 2d 296 (2d Cir. 1952); *Feinberg* v. *Commissioner,* 198 F. 2d 260 (3rd Cir. 1952); *Commissioner* v. *Moses,* 214 F. 2d 912 (2d Cir. 1954); *Commissioner* v. *Miller,* 199 F. 2d 597 (9th Cir. 1952). In each of the cited cases an action for divorce followed soon after the execution of the separation agreement.

In the *Lerner* case, suit for divorce followed execution of the separation agreement by twelve months; in the *Feinberg* case, by six weeks; in the *Moses* case, by six months; and, in the *Miller* case, by eight days.

In the case at bar, there was an eleven year period between the execution of the separation agreement and the commencement of suit for divorce, which did not result in a final decree until some fourteen years after the execution of said agreement.

It is respectfully submitted that the agreement of April 7, 1932 was not "incident" to the 1946 divorce within the meaning of Section 22(k) and that the payments made to petitioner were not taxable to her under such Section.

B. The holding of the Court of Appeals, affirming the decision of the Tax Court, fails to take cognizance of, or pass upon, the law of the State of New Jersey enunciated in an intervening decision of the New Jersey Superior Court and raised by the petitioner in oral argument. The holding of the New Jersey court in a litigated, adversary proceeding, that the agreement herein involved did not provide "alimony" was binding upon the court below.

At the oral argument before the court below, petitioner's counsel submitted that the law of New Jersey (enunciated in the intervening decision of the New Jersey Superior Court) holding that the agreement herein involved was not alimony, was dispositive of the issue confronting the Court of Appeals. It was maintained by petitioner that the separation agreement of 1932 did not provide for alimony under New Jersey law and the payments made to her thereunder were not taxable to her within the meaning of Section 22(k) of the Internal Revenue Code of 1939. It is respectfully submitted herein that the United States Court of Appeals for the Third Circuit was bound by the decision of the Superior Court of New Jersey under the doctrine of this court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 (1938).

Briefly, in the *Erie* case, the plaintiff was injured while walking in a pathway along the tracks of the railroad. Suit was instituted in the Southern District of New York. The railroad was a New York corporation. Jurisdiction was based on diversity. The decision was for the plaintiff. On appeal to the United States Court of Appeals for the Second Circuit, the Erie Railroad argued that the decisions of the Pennsylvania courts must be followed. The Court of Appeals affirmed on the grounds that the question involved a matter of general jurisprudence and a federal

court could exercise its independent judgment under the long-standing rule of *Swift* v. *Tyson,* 16 Pet. 1, 10 L. Ed. 865 (1842). This court overruled *Swift* v. *Tyson,* and reversed and remanded. In granting certiorari, Justice Brandeis stated his reason as follows:

> "Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari." 304 U. S. 64, 71 (1938).

And, the court went on to add:

> "* * * Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts * * *" 304 U. S. 64, 78 (1938).

The doctrine of the *Erie* case remains a part of the law of the land and its progeny are numerous. For example, in *Stoner* v. *New York Life Insurance Company,* 311 U. S. 464 (1940), this court held that an intermediate appellate court is an organ of the state and its determination, in the absence of other convincing evidence on state law, must be followed by a federal court in a question governed by state law. To the same effect is *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223 (1940).

It is respectfully submitted that a determination of what constitutes alimony is a problem peculiar to state law. Alimony is provided for under the statutes of New Jersey and jurisdiction over the same is vested in the Superior Court of New Jersey. N. J. S. 2A:34-8; N. J. S. 2A:34-23 et seq. Alimony, thus, is not a part of the federal judicially declared law which constitutes what might be denominated as the federal common law. Frequently, there exists the necessity for a precise balancing of federal and state law. Federal questions, such as liability to federal taxation, may depend upon the interpretation of an act which must be determined by state law. See, *Moore's Commentary on the United States Judicial Code*, p. 309, Matthew Bender & Co., New York, New York (1949). "Alimony" is nowhere defined or explained in the Internal Revenue Code of 1939 and a determination thereof must perforce be dependent upon state law; in this case, the decisional law of New Jersey. In *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944), this court defined what state court decisions are controlling. The case was remanded to the Circuit Court of Appeals for reconsideration in the light of an intervening state Supreme Court decision. In like manner, the court below erred in disregarding the effect of the intervening decision of the Superior Court of New Jersey promulgated subsequent to the Tax Court trial herein. Said New Jersey decision has since been affirmed by the Appellate Division of the Superior Court of New Jersey on March 25, 1958 in Docket No. A-56-57, not officially reported as yet.

Among other examples of the importance of state law in the resolution of federal questions are: *Blair* v. *Commissioner*, 300 U. S. 5 (1937) (state law determines the recipi-

ent of trust income); *Morgan* v. *Commissioner,* 309 U. S. 78, 80 (1940); "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed" (power of appointment under state law); and *Moore* v. *Illinois Central Railroad,* 312 U. S. 630 (1941) (reversed lower court for failure to follow state law on a question of a state statute of limitations).

A rule of law announced by the New Jersey Chancery Court, the predecessor of the present Superior Court, Chancery Division, (which decided the intervening New Jersey case hereinabove referred to in the instant matter) was held binding on a federal court in *Fidelity Union Trust Company* v. *Field,* 311 U. S. 169 (1940). The holding of the *Field* case was clarified by this court in *King* v. *Order of United Commercial Travelers of America,* 333 U. S. 153 (1948), which held that a federal court in South Carolina was not bound to follow the unreported decision of a South Carolina nisi prius court. The case was distinguished from the *Field* case by Chief Justice Vinson who pointed out that there was only one Chancery Court in New Jersey; that said court had statewide jurisdiction; and that its decisions were reported. A decision of the current counterpart of the old New Jersey Chancery Court was binding upon the court below within the rationale of the *Field* and *King* cases.

It has been amply demonstrated above that the question as to what is alimony in the instant matter is a problem of state law and should have been determined according to the decision of the state court. This court granted certiorari in like cases in *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202 (1938) and *Rosenthal* v. *New*

York Life Insurance Company, 304 U. S. 263 (1938). Under the holdings of these cases it is unnecessary for this court to go so far as to determine whether the decision below is, in fact, in conflict with local law. It is enough to find that the issue involved is one of state law, to be resolved in accordance with the state court decision.

Finally, it is the petitioner's contention that the decision of the court below should be reversed in accordance with the recent interpretation of the separation agreement of 1932, reflected in the intervening decision of the New Jersey Superior Court, as subsequently affirmed. This court held in *Vandenbark* v. *Owens-Illinois Glass Company*, 311 U. S. 538 (1941), that state law at the time of the appellate decision is controlling and not at the date the trial court judgment is entered.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SYDNEY A. GUTKIN,
Counsel for Petitioner.

JEROME R. MILLER,
Of Counsel.

Dated: April 11, 1958.

APPENDIX "A".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,277

MARY MacFADDEN,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON APPEAL FROM A DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued November 19, 1957.

Before BIGGS, *Chief Judge*, and GOODRICH and HASTIE, *Circuit Judges.*

Opinion of the Court.

(Filed December 18, 1957.)

By GOODRICH, *Circuit Judge.*

The question here involved is whether a divorced wife must pay income tax on payments made to her by her former husband under a written agreement between them. The law involved is § 22(k) of the Internal Revenue Code of 1939. The years involved are 1946 to 1950 inclusive. Taxpayer lost in the Tax Court, 15 CCH Tax Ct. Mem. 1494 (1956), and brings the case here for review.

Appendix "A"—Opinion below.

Bernarr MacFadden and Mary MacFadden were married in 1913. The document out of which the litigation grows was executed April 7, 1932. By the terms of the 1932 agreement a trust was set up the income of which was to be paid to Mary MacFadden during her lifetime, with a provision that if the income was not sufficient to bring payments up to a certain sum additional money would be paid to do so.

Neither side has given us the contract in its entirety and each side has quoted portions thought favorable to its position.

The paragraph most favorable to the Commissioner's position states:

> "The provision herein made for the support and maintenance of the party of the second part is hereby expressly agreed to be in lieu of all alimony or suit money and the party of the second part expressly covenants and agrees to receive the said income from said trust in lieu of any such alimony or suit money, and hereby expressly covenants and agrees that so long as the conditions of this agreement are complied with by the party of the first part, she will not make any claim for alimony, counsel fee, or suit money, either for herself or for the children of the said marriage, in any action for divorce which she may commence against the party of the first part. * * *"

As against this provision the taxpayer points out that the wife gave up certain rights. She agreed that so long as the terms of the agreement were complied with she would "at no time take any step or action which would hold the said party of the first part up to public ridicule, contempt or unfavorable notoriety and publicity, and the domestic unhappiness of the parties shall be kept between the parties hereto. * * *" It is suggested that by these terms

she agreed not to sue for divorce. She also testified at the trial of this case, if the information is relevant, that she did not contemplate divorce at the time of the agreement.

To apply § 22(k) to the various disputes arising between taxpayers and Commissioner illustrates the difficulty of providing language that will categorically resolve widely differing fact situations. Here we have an agreement executed ten years before § 22(k) was passed. It was not until 1946 that a divorce resulted from proceedings instituted in Florida by the taxpayer's husband.[1]

The controlling words in § 22(k) are as follows:

> "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments * * * received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife * * *"

Were the payments to Mrs. MacFadden, the taxpayer, made under a written instrument incident to such divorce or separation?

---

[1] Of doubtful relevance is a provision in the Florida decree as follows:
"It appearing that support of the wife having been adequately provided for by separate agreement no adjudication thereon is made but jurisdiction is retained to be exercised in event that subsequent developments justify further or other relief in respect thereto."
We think it is of doubtful relevance because it can show no more than that the Florida judge considered that the matter of the wife's right of alimony had already been taken care of. That thought, we believe, does not help us to decide the application of § 22 (k).
Compare Lerner v. Commissioner, 195 F. 2d 296, 299 (2d Cir. 1952), *with* Commissioner v. Moses, 214 F. 2d 912, 914 (2d Cir. 1954).

Appendix "A"—Opinion below.

This case is something like our problem in *Feinberg* v. *Commissioner,* 198 F. 2d 260 (3d Cir. 1952). It differs in two respects. In this case the obligation to support on the part of the husband lasted as long as the wife lived. It did not in *Feinberg.* Second, in *Feinberg* the divorce action was brought within a few months after the agreement was made. We think the first point has some force but is squarely covered by *Lerner* v. *Commissioner,* 195 F. 2d 296 (2d Cir. 1952); *Izrastzoff* v. *Commissioner,* 193 F. 2d 625 (2d Cir. 1952). Our own decision in *Cox* v. *Commissioner,* 176 F. 2d 226 (3d Cir. 1949), states the purpose of § 22(k) in the light of its legislative history.

A series of cases in the Second Circuit gives the greatest help upon our problem here for that Court of Appeals has had the issue before it in several varying circumstances. We think two things are made clear in a series of opinions. One is that the legislative purpose here was to put, in the stated situations, the tax burden upon the one who receives and enjoys the income. The second proposition is that we need not go into subjective tests as to whether divorce or separation was contemplated at the time of the separation agreement. As said in the *Lerner* case, the term concerning the written instrument was designed "only to insure adequate proof of the existence of the obligation when divorce has occurred * * * So where the payments obviously take the place of alimony * * *, although not formally incorporated into the decree, they should not be denied effect under the statute merely because there is no evidence that divorce and settlement were not contemporaneously planned and carried out." 195 F. 2d at 298. The Second Circuit cases which we have found helpful are: *Izrastzoff* v. *Commissioner, supra; Lerner* v. *Commissioner, supra; Commissioner* v. *Moses,* 214 F. 2d 912 (2d Cir. 1954); *Holt* v. *Commissioner,* 226 F. 2d 757 (2d Cir. 1955).

The agreement before us clearly makes provision for payment in lieu of alimony and in pursuance of the husband's marital obligation. This is equally true whether divorce was or was not contemplated at the time the parties made the agreement. And there should be no difference because the final decree was not granted until fourteen years later. To impose the obligation to pay the taxes following the divorce upon the wife is but to carry out the stated intent of Congress to put the burden of tax payment upon the person who has enjoyed the income. We think the conclusion of the Tax Court was correct although we think this Circuit along with the Second and Ninth[2] Circuits are right in making an examination of the facts and the agreement and not probing into the state of mind of either of the parties to the agreement at the time it was made.

The decision of the Tax Court will be affirmed.

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[2] Commissioner v. Miller, 199 F. 2d 597 (9th Cir. 1952).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,277.

MARY MacFADDEN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES.

Present: BIGGS, *Chief Judge,* and GOODRICH and HASTIE, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

December 18, 1957.

APPENDIX "C".

Statute Involved.

Internal Revenue Code of 1939.

Sec. 22. GROSS INCOME.

(k) Alimony, Etc., Income. In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband.

* * *

APPENDIX "D".

Separation Agreement.

THIS AGREEMENT made and entered into this 7th day of April, 1932, between BERNARR MACFADDEN, of Englewood, New Jersey, party of the first part, and MARY MACFADDEN, his wife, of the same place, party of the second part,

WITNESSETH:

WHEREAS, the parties hereto are husband and wife; and

WHEREAS the following children were born as a result of the marriage of said parties, and are now living, viz: BERNYCE, BEULAH, BRAUNDA, BEVERLY, BYRWIN and BREWSTER, and

WHEREAS certain unhappy differences and disputes have arisen between the parties hereto, who have been living apart; and

WHEREAS the parties hereto have agreed to live separate and apart during their natural lives; and

WHEREAS the party of the first part has heretofore duly made adequate provision for all of the said children hereinbefore described; and

WHEREAS it is the intention and desire of the parties hereto that suitable provision be made for the support and maintenance of the party of the second part during her life, in lieu of alimony; and

WHEREAS the party of the first part has heretofore and on the 24th day of September, 1931, created a trust in writing by deed of gift to City Bank Farmers Trust Company, as Trustee, for the party of the second part,

Appendix "D"—Separation Agreement.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the parties hereto agree as follows:

1. It shall be lawful for the parties hereto to live separate and apart and free from marital control and authority, as if each of them was sole and unmarried and free from any control or restraint, direct or indirect, by the other. This said provision or any provision hereinafter contained shall not, however, be construed to mean that either of the parties hereto may commit acts of adultery, nor shall the same be construed as condonation of any such acts, if committed.

2. Neither of the parties hereto shall molest or annoy the other, or compel or endeavor to compel the other to cohabit or dwell with him or her by any legal or other proceedings for the restoration of connubial rights or otherwise.

3. The said deed of trust dated September 24th, 1931 be and the same hereby is cancelled, nullified and revoked.

4. Simultaneously herewith the party of the first part agrees to execute an irrevocable deed of trust providing for the following:

(a) The transfer to the City Bank Farmers Trust Company, as Trustee, of 2500 shares of the preferred stock of Macfadden Publications, Inc.

(b) The payment of the income of the said trust fund by the said Trustee to the party of the second part, the beneficiary thereunder, during her lifetime, for her sole use and benefit, less a sum therefrom equal to three-tenths of the cost of the up-keep, expense, maintenance and support, including rent and/or carrying charges of a home to be provided by the party of the first part for the party of

the second part and their children, which said sum is to be deducted by the Trustee for the periods when the said home is used by the party of the second part.

(c) Said deed of trust shall provide that during the lifetime of the party of the first part the cost, expense, upkeep, maintenance and support of the home as referred to in subdivision "b" hereof shall be such as the party of the first part shall certify in writing, payable in such manner and to such person as he shall designate, and after the death of the party of the first part the said sum shall be and hereby is fixed at a maximum of Six Hundred ($600.00) Dollars per month, but never in excess of the actual amount thereof.

(d) The deed of trust shall further provide that said income shall be paid to the party of the second part during her lifetime and upon her death the corpus of such trust shall be paid over to the Bernarr Macfadden Foundation, Inc., a New York corporation.

5. It is further understood and agreed that the corpus of the said trust shall not be sold by the Trustee without the written consent of the parties hereto and that the Trustee shall be so bound by appropriate instrument. After the death of the party of the first part, the consent necessary shall be that of the beneficiary and the Bernarr Macfadden Foundation, Inc.

6. Except as inconsistent herewith and as amended hereby the said deed of trust shall be in form and shall contain the provisions set forth in the deed of trust dated September 24th, 1932 (sic).

7. Simultaneously herewith the party of the first part shall turn over and properly transfer, assign and deliver to the party of the second part 590 shares of preferred stock of Macfadden Publications, Inc. to be hers absolutely. The

party of the first part shall simultaneously herewith turn over and properly transfer, assign and deliver to the party of the second part a certificate for 1,000 shares of preferred stock of Macfadden Publications, Inc., the income of which shall be payable and shall belong to the party of the second part during the term of her life and thereafter the principal of the said 1,000 shares shall be divided equally among the children then living of the parties hereto. The said stock herein referred to being the certificates of stock now the subject of an action pending between the parties. Simultaneously herewith the party of the second part shall discontinue and release the said action now pending in the Supreme Court of the State of New York and shall make and execute a general release to the party of the first part and Macfadden Publications, Inc. of any further claims arising therefrom; said 1,000 shares herein referred to being also the 1,000 shares referred to in the deed of trust dated September 24th, 1931 and revoked by this instrument.

8. The parties hereto shall have the joint custody of the said children of the marriage until they shall marry or otherwise be emancipated or their custody voluntarily relinquished. So long as such children are in the custody of the party of the second part, the party of the first part will be afforded the opportunity of visiting the said children at all reasonable hours and free from molestation by the party of the second part.

9. The party of the second part hereby expressly recognizes that any unfavorable publicity or notoriety would seriously jeopardize the business interests of the party of the first part and materially depreciate the income of the trusts created, and that it would reflect on and cause mental anguish to the children of the said marriage. With this thought in mind, and so long as the terms of this agreement are complied with, the party of the second part hereby

expressly agrees that she will at no time take any step or action which would hold the said party of the first part up to public ridicule, contempt or unfavorable notoriety and publicity, and the domestic unhappinesses of the parties hereto shall be kept between the parties hereto, and the said party of the second part in her custody and supervision of the said children shall not intentionally suffer them to do any act which will bring the party of the first part any unfavorable publicity. It is understood and agreed that if it be judicially determined that the party of the second part has violated this provision (paragraph 9), then the party of the first part may ~~at his election revoke~~ the aforementioned trust and in such event upon presentation of such judicial proof to the City Bank Farmers Trust Company, the said Trust Company shall thereupon pay over the corpus of said trust fund to the Bernarr Macfadden Foundation, Inc., or anyone else whom the party of the first part will designate. The judicial determination required under this provision shall be the determination of a Court of Record of the State of New Jersey as affirmed (if any appeal be taken) by the higher Court of Appellate Jurisdiction.

10. All wearing apparel and personal belongings and effects of the party of the second part, and all movable personal property belonging to her, now in her possession, shall belong to her as her sole and separate estate, independent of the party of the first part.

11. The party of the second part will not attempt to pledge the credit of the party of the first part in any way whatsoever and the party of the first part shall not be required to pay any debts incurred by the party of the second part either on her own behalf or on behalf of the children of the said marriage. If, however, any judgment should be recovered against the party of the first part for any debt

or obligation incurred by the party of the second part, then and in that event it shall be the right of the party of the first part to pay the said judgment and instruct the said Trustee hereinbefore mentioned to deduct the said amount of the said judgment from the allowance to be paid to the party of the second part under the terms of this agreement.

12. The provision herein made for the support and maintenance of the party of the second part is hereby expressly agreed to be in lieu of all alimony or suit money and the party of the second part expressly covenants and agrees to receive the said income from said trust in lieu of any such alimony or suit money, and hereby expressly covenants and agrees that so long as the conditions of this agreement are compiled with by the party of the first part, she will not make any claim for alimony, counsel fee, or suit money, either for herself or for the children of the said marriage, in any action for divorce which she may commence against the party of the first part. It is understood and agreed by the party of the first part that if the trust to be hereafter created by him as aforesaid, shall not yield a minimum income of Fifteen Thousand ($15,000.00) Dollars per annum to the party of the second part, he will then be personally liable to the party of the second part for any deficiency, except as hereinafter provided.

13. It is understood and agreed that should the income from the said trust at any time be less than the sum of Fifteen Thousand ($15,000.00) Dollars, then and in that event the party of the first part will pay the difference between the amount of such dividends and the said sum of $15,000.00 to the Trustee hereunder, which said sum shall be considered as income from the said trust, except that (a) when and if the said stock constituting the corpus of the said trust shall subsequently pay such accrued dividends that were unpaid for the period due, then and in that

event such accumulated dividends shall be applied to the repayment and reimbursement of the party of the first part for such sums so paid by him; and (b) in the event that the income from such trust shall be less than the amount of Fifteen Thousand ($15,000.00) Dollars, and the financial status of the party of the first part changes owing to financial reverses so that his income shall be reduced, then and in that event, upon the request of the party of the first part, the question shall be submitted to arbitration to determine what changes, if any, shall be made in sub-division (a) hereof and what amounts, if any, the party of the first part shall be personally liable for, in addition to the income, if any, from such trust.

14. The obligation to supply a home as hereinbefore provided shall be discharged by the party of the first part in any of the following ways:

(a) By permitting the party of the second part and the children of the parties hereto to use the home in Englewood, New Jersey; or

(b) A home shall be purchased by the party of the first part, title to remain in him or in his designee or assignee, in a suitable locality of a suitable nature. The total purchase price of the said home shall not be in excess of the sum of Fifty Thousand ($50,000.00) Dollars and the same may be purchased on such terms as the said party of the first part and the seller or owner of the said home may agree and determine. Such terms shall be agreeable to the party of the first part, and the persons or corporation holding title thereto shall by appropriate agreement covenant to permit the party of the second part and the said children to remain in and enjoy the said property during the lifetime of the said party of the second part; or

(c) The party of the first part shall, by appropriate deed, create a tenancy by the entirety of certain property

in the City of Nyack and build thereon an appropriate home at a cost not to exceed the sum of Twenty-five Thousand ($25,000.00) Dollars, in which event the party of the second part shall have the right and option, in addition to the use of such home, to rent or maintain an apartment in the City of New York or elsewhere.

15. It is the intention of this agreement that all of the provisions herein contained and all of the reciprocal provisions contained in certain trust deeds for the benefit of the said children, containing the apportionment of the income from all of the said trusts and the charging of the sums or percentages therein specified against such income towards the support and maintenance of a home shall apply to and obtain in any of the conditions set forth in subdivisions (a), (b), or (c) of paragraph "14" JHB hereof and in the event of the contingency set forth in subdivision (c) of paragraph "15" hereof, then such charges are also to obtain in connection with the rental of the apartment therein described and in the payments of carrying charges on the Nyack property.

16. In case of the happening of the contingencies described in subdivisions (b) and (c) of paragraph "14" JHB hereof, the party of the second part shall be entitled to so much of the furniture and furnishings or all of the furniture and furnishings now in the home at Englewood, New Jersey, as may in her opinion be suitable and necessary to furnish the said home mentioned in subdivision (b) or said Nyack home and the said apartment.

17. The party of the first part agrees to pay the party of the second part for counsel fees for services rendered by Hartman, Sheridan, Tekulsky & Pecora Esqs., attorneys for the party of the second part in an amount to be fixed as hereafter mutually agreed upon.

18. In all respects this agreement shall be binding on the parties hereto, their heirs, representatives and assigns and shall not be subject to change, amendment or review.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

B. MacFadden (L. S.)
Mary MacFadden (L. S.)

Witness as to
Mary Macfadden
J. H. Banton

Appendix "D".

Trust Agreement.

I, Bernarr Macfadden, of Englewood, New Jersey, for the support and maintenance of my wife Mary Macfadden during the term of her natural life, hereby assign, transfer and convey two thousand five (2,500) shares of preferred stock of Macfadden Publications, Inc. to the City Bank Farmers Trust Company of New York and its successors and assigns (hereinafter designated the "Trustee") as Trustee, to be held by the Trustee in trust for the uses and purposes herein set forth:

1. In disposing of the income and principal of this trust, the Trustee's duties shall be:

A. During the life of my wife, Mary Macfadden, to pay over the income of the trust fund for her support and maintenance and to her use and benefit, less a sum therefrom equal to three-tenths of the cost of the up-keep, expense, maintenance and support, including rent and/or

carrying charges, of a home to be provided for my said wife and my children as set forth in a certain agreement dated April 7th, 1932. The Trustee shall pay over and apply the said proportion for the purposes aforesaid.

B. After the death of my said wife, then to pay over the principal of said trust to Bernarr Macfadden Foundation, Inc., a New York corporation.

2. It is the intention and desire of myself and the beneficiary, and this trust is created, for the purpose of providing for the support and maintenance of the said beneficiary, and the income so to be paid shall be in lieu and in place of any and all obligations for such support and maintenance, and in lieu and place of any and all obligations for her necessaries to her to third persons.

3. The Trustee shall have, with respect to any and all property at any time in its hands hereunder, the following powers (except as provided in paragraph "9" hereof):

A. To retain such property as an investment without regard to the proportion such property or property of a similar character, so held, may bear to the entire amount of the trust estate.

B. I reserve the right during my life to vote any shares of stock the property of the said trust and to grant proxies, discretionary or otherwise to vote upon any proposition or election at any meeting of stock or security holders; to consent to and participate in any plan of reorganization, consolidation, merger, combination or other similar plan and to consent to any contract, lease, mortgage, purchase, sale or other action by any corporation pursuant to such plan, and to deposit any such property or stock with any protective, reorganization or similar committee and to exercise all conversion, subscription, voting and other rights of whatsoever nature pertaining to any of such property, and to grant proxies, discretionary or other-

wise, in respect thereto. After my death, all such rights so reserved belong to the Trustee.

C. The Trustee may do all such acts, take all such proceedings, and exercise all such rights and privileges, although not hereinbefore specifically mentioned, with relation to such property as if the absolute owner thereof and in connection therewith to enter into any covenants or agreements binding the trust estate, except as hereinbefore provided.

4. All powers granted to the Trustee hereunder shall continue until actual distribution by it of the trust property.

5. Income accrued on property at the time of transfer to the Trustee shall be income of the trust. Upon the termination of any estate, income accrued but not yet due and payable, after deducting any charges or advances against it, shall belong to the next estate. The Trustee shall not out of income amortize premiums paid for trust securities, nor make any additions to income because of the purchase of securities at a discount. Parties dealing with the Trustee shall not be obligated to look to the application of any monies paid to the Trustee, or to ascertain whether my consent or direction to any transaction has been obtained or is required.

6. The compensation of the Trustee shall be the commission specified in the "Fee Memorandum" signed by me, to be collected and charged as therein stated.

7. I reserve the right at any time to assign, transfer and deliver to the Trustee any other investments, securities or property that I may wish to substitute for property then constituting the principal of the trust, and such substituted securities or property shall be held by the Trustee and shall be subject to all the conditions and provisions herein contained, it being understood that the property so substituted shall be of equal market value on the date of

such substitution to the property for which the substitution is made.

8. During my life the cost, expense, up-keep, maintenance and support of a home as referred to in subdivision A, paragraph 1, shall be such sum as I shall certify in writing delivered to the Trustee, and the Trustee is hereby authorized to apply the percentage as therein provided of such cost as so certified by me by making payment thereof in such manner as I shall direct in writing. After my death said percentage, to wit, three-tenths of such cost, shall be and hereby is fixed at the sum of Six Hundred Dollars ($600.00) per month.

9. Any securities, deposited by me in this trust shall not during its term be sold, pledged or conveyed or in any manner disposed of without the written consent during my life of myself and the beneficiary hereunder, and after my death of the beneficiary and the Bernarr Macfadden Foundation.

10. By mutual consent expressed in writing this trust may be terminated at any time by the grantor and my said wife in which event the Trustee hereunder shall pay over the principal to me or my designee, assigns or legatees.

11. This deed of trust is executed by me and the estate hereunder created by me pursuant to the terms of an agreement dated April 7th, 1932 between myself and my said wife, Mary Macfadden, and it is subject to all of the present terms, covenants and conditions of the said agreement, a copy of which is hereunto annexed.

12. The trust shall take effect upon acceptance by the Trustee and in all respects shall be governed by the Law of New Jersey.

WITNESS my hand this 7th day of April, 1932 at New York, State of New York.

B. MACFADDEN.

Appendix "D"—Trust Agreement.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

On this 7th day of April, 1932 before me personally appeared BERNARR MACFADDEN, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

ARTHUR H. MARTIN
Notary Public, Queens County
Queens Co. Clk. No. Reg. No. 2753
N. Y. Co. Clks No. Reg. No. 4-M-453
Commission expires March 30, 1934

Delivery of this instrument in New York is acknowledged and the foregoing Trusteeship is accepted this 7th day of April, 1932.

CITY BANK FARMERS TRUST COMPANY
By: W. G. CHISOLM
Trust Officer

Attest:
S. R. WALKER
Asst Secretary

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

On this 7th day of April, 1932 before me personally appeared W. G. CHISOLM who being by me duly sworn did depose and say: That he resides in N. Y. City, that he is Trust Officer of CITY BANK FARMERS TRUST COMPANY the

corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was thereunto affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

RUTH REYNOLDS
Notary Public, Westchester Co.
Cert. filed N. Y. Co. Clk's No. 567
Reg. No. 3R381
Commission expires March 30, 1933

APPENDIX "E".

MARY MACFADDEN, PLAINTIFF

v.

BERNARR MACFADDEN, *et als.*, DEFENDANTS.

Superior Court of New Jersey
Chancery Division

Decided August 28, 1957.

FREUND, *J. S. C.*

This is an action for specific performance of a provision in a separation agreement.

On April 7, 1932 Bernarr Macfadden, now deceased, and the plaintiff Mary Macfadden, husband and wife since 1913, entered into a separation agreement which expressly provided that he would supply her with a home during her lifetime by permitting her and their children "to use the home in Englewood, New Jersey; or" by alternative provisions of no present concern. The agreement further provided that the plaintiff would bear three-tenths of the up-keep and carrying charges of the home. The Macfaddens had lived together in the Englewood home since 1927, but in 1930 Mr. Macfadden left to live elsewhere. Mrs. Macfadden has continued to reside in the home up to the present time. During her occupancy of the premises, until about the year 1953, all taxes and maintenance charges were paid by Macfadden and the defendant, Bernarr Macfadden Foundation, Inc., but they have not been paid since 1953 and are presently in default.

In accordance with the agreement, plaintiff discontinued an action in the Supreme Court of the State of New York in which Macfadden was a party; additionally, she re-

leased and surrendered to Macfadden and Macfadden Publications, Inc. certain claims she asserted against them and surrendered certain shares of stock in the corporation which she held by virtue of a deed of trust created by Macfadden.

Macfadden died testate on October 12, 1955. In the present proceedings his executors are made defendants, together with the Bernarr Macfadden Foundation, Inc. and others. The Bernarr Macfadden Foundation, Inc. is a New York membership corporation authorized to transact business in New Jersey. It has held the title to the Englewood property since 1937, and in December 1954 requested plaintiff's permission to use a portion of the home for its offices but she declined. In 1955 it advertised for sale the property. Thereupon plaintiff filed a complaint in the instant proceedings charging the Foundation to be a corporate disguise and the *alter ego* for Bernarr Macfadden and seeking protection of her right to the use of the premises in accordance with the agreement. She also seeks a declaration of her rights in the property; and an order directing the defendants to pay the arrearages and current taxes and carrying charges against the property and to make all necessary repairs. Pursuant to a preliminary application an interlocutory injunction was granted restraining the disposal of or interference with the plaintiff's occupancy and use of her home. Subsequent to the issuance of the restraint the foundation entered into an option agreement giving prospective purchasers the privilege of purchasing the premises occupied by the plaintiff, subject to the restraining order. The option agreement was executed by Bernarr Macfadden, as president of the Foundation.

The executors of Bernarr Macfadden's estate contend that the obligation of the decedent to provide a home for plaintiff during her life was in lieu of alimony and hence that it terminated upon his death. The foundation argues a number of points which fall into two categories; one, the

same contention made by the executors; and second, that it is not a stock corporation but was organzied for public trust purposes and that therefore the conventional rule pertaining to piercing of the corporate veil is not applicable.

In 1946 Macfadden obtained a divorce from the plaintiff in a Florida court, where consideration was given to the agreement in question. The final decree of that court provided, *inter alia*, that "support of the wife having been adequately provided for by separate agreement, no adjudication thereon is made," but retained jurisdiction in the event that subsequent developments justified further consideration of support for Mrs. Macfadden. Additionally, the validity of the agreement has been upheld in prior litigation between the parties in the Court of Chancery in this State and in the Supreme Court of the State of New York. *City Bank Farmers Trust Co.* v. *Macfadden,* 131 N. Y. S. 2d 232 (Sup. Ct. 1954). On June 20, 1934 our former Court of Chancery by a final decree, with the consent of Macfadden, ordered that the agreement of the Macfaddens, dated April 7, 1932, "be specifically performed and carried out by the said Bernarr Macfadden, in accordance with its several terms, up to the date of this decree." This court concurs with the express or implicit ruling of these cases that the agreement in question is valid.

[1-3] The contractual engagement by Macfadden to provide the plaintiff with a home for life in the Englewood property is not alimony. The power of a court to award alimony is purely statutory, and as used in our statute has a technical significance, N. J. S. 2A:34-8 and 2A:34-23. Its purpose is to require the husband to make periodic payments to the wife for her support commensurate with his circumstances and her necessities. It is a purely personal right in the nature of an annuity. *Lynde* v. *Lynde,* 64 N. J. Eq. 736, 753 (E. & A. 1902); *O'Loughlin* v. *O'Loughlin,* 12 N. J. 222, 229, 230 (1953). The obligation to pay alimony

terminates upon the death of the husband. *Modell* v. *Modell,* 23 N. J. Super. 60 (App. Div. 1952). However, the obligation undertaken by Macfadden to furnish a home for plaintiff for life did not terminate with his death; it continues as an obligation of his estate. The reason for this is two-fold: (1) it is not alimony but a contractual obligation to furnish his wife with a home for life; and (2) the agreement expressly provides in paragraph 18 thereof that it shall be binding upon his executors, as follows:

> "In all respects this agreement shall be binding on the parties hereto, their heirs, representatives and assigns and shall not be subject to change, amendment or review."

[4] A deed by a husband conveying to his wife a life estate in realty owned by him does not terminate the life estate upon his death. *Linker* v. *Linker,* 32 N. J. Eq. 174 (Ch. 1880); *Herbert* v. *Alvord,* 75 N. J. Eq. 428 (Ch. 1909); *Andreas* v. *Andreas,* 84 N. J. Eq. 375 (Ch. 1915); *Strong* v. *Strong,* 136 N. J. Eq. 103 (E. & A. 1944). In like manner, an agreement by the husband to provide a home for the use of his wife for life cannot be classified as an obligation to pay alimony, terminable upon his death. He obligated himself for the performance of this agreement and it will be enforced in a court of equity. *Aspinwall* v. *Aspinwall,* 49 N. J. Eq. 302 (E. & A. 1892); *Mockridge* v. *Mockridge,* 62 N. J. Eq. 570 (Ch. 1901).

[5, 6] The plaintiff argues that the Foundation is the *alter ego* of Macfadden and that its corporate form should be pierced. It is entirely settled that a corporate form will be penetrated by equity where it is used as a shield behind which injustice is sought to be perpetrated or where the corporate cloak is used as a subterfuge to justify wrong. *Irving Investment Corp.* v. *Gordon,* 3 N. J. 217, 223 (1949). When the interests of justice are to be served, a court of

equity will disregard the corporate entity and the stockholders will be regarded as though they were an association of individuals. The theory of a corporation being a legal entity is but a legal fiction—equity will look through the form and discern the substance. If a fraudulent purpose or use of a non-pecuniary association or corporation is established, the power of a court of equity to pierce the corporate entity exists even though it has no stockholders and its formation ostensibly is in the public interest. *Whitfield* v. *Kern,* 122 N. J. Eq. 332, 346 (E. & A. 1937); *Irving Investment Corp.* v. *Gordon, supra; Newark Ladder & Bracket Sales Co.* v. *Furniture Workers, etc.,* 125 N. J. Eq. 99, 102 (Ch. 1939); *Frank* v. *Frank's Inc.,* 7 N. J. 218 (1952). However, unless such a fraudulent purpose or use is disclosed, there is no justification for attacking the corporate structure.

The Englewood house had been the home of both Bernarr and Mary Macfadden from the time of its purchase until about 1930 and has continued to be the plaintiff's home until the present time. Although Macfadden testified by deposition that in 1927 he had paid the purchase price for the Englewood home, title to the property was never in his name but, rather, in some corporation over which he had control and in which he was the dominant personality. Apparently, it was his practice to operate his various business enterprises through corporate structures for his personal benefit.

Title was taken initially in the name of Garden Suburbs, Inc., by deed dated September 3, 1927. Thereafter it was conveyed to Bernarr Macfadden, Inc., a New Jersey corporation, by deed dated November 7, 1929, which corporation subsequently changed its name to New Jersey Commonwealth Realty Corporation. The stock of the New Jersey Commonwealth Realty Corporation was owned by Vitolyzed Air Corporation, the controlling interest of

which, if not the entire stock, was owned by Macfadden. In 1931 Macfadden organized Bernarr Macfadden Foundation, Inc., defendant herein, ostensibly a non-profit organization for public purposes and transferred his stock holdings in Vitolyzed to it. In 1937, being advised that it would be advantageous for tax purposes, the Foundation caused the Vitolyzed and New Jersey Commonwealth Corporation to be dissolved. The New Jersey Commonwealth Realty Corporation thereupon conveyed the Englewood property to the Foundation, by deed dated March 24, 1937.

[7, 8] According to the by-laws of the Foundation, Macfadden possessed ten votes while each of the other eight members held but one. No one other than Macfadden, so far as is disclosed by the testimony, contributed any funds or property to any of the various corporations. It is clear that these corporations were the creatures and pawns of Macfadden. Nevertheless, there is no testimony or evidence of fraudulent purpose or objective. The mere use of corporate entities as devices for the holding or transfer of title is not in itself fraudulent. However, the proofs disclose that although the legal title was in various corporations which he controlled, Macfadden in his lifetime was in fact the owner of the realty and treated it as his property. In reason and justice, Mrs. Macfadden is entitled to the benefit of the agreement made by Macfadden, irrespective of the form employed to veil his ownership. Equity will not permit the doctrine of corporate entity to be used for the purpose of defeating justice. *Garford Trucking, Inc.*, v. *Hoffman*, 114 N. J. L. 522, 529, 530 (Sup. Ct. 1935); *Telis* v. *Telis*, 132 N. J. Eq. 25, 29 (E. & A. 1942).

[9] The Foundation apparently recognized the outstanding interest of the plaintiff for it did not disturb her possession and use of the premises from the time of the agreement in 1932 until the recent happenings which pre-

cipitated this proceeding. Nor has plaintiff's interest been questioned by the various title owners since the date of the agreement, even though the Foundation and its predecessors in title were under a duty to inquire of the plaintiff, as the person in exclusive possession of this dwelling house, what rights or interest she possessed in the premises. The defendants are chargeable with notice of such facts as the inquiry, if made, would have revealed. Such inquiry would have disclosed to the Foundation, if it did not already know, that she had a right to occupy the premises as her home for life; that she has a life estate in the use and possession of the premises. *Wood* v. *Price*, 79 N. J. Eq. 620 (E. & A. 1911); *La Combe* v. *Headley*, 91 N. J. Eq. 63 (E. & A. 1919); *Schnakenberg* v. *Gibraltar Savings and Loan Ass'n*, 37 N. J. Super. 150, 157 (App. Div. 1955). Accordingly, the title held by the Foundation is subject to the life estate of plaintiff in accordance with the written agreement of April 7, 1932, between plaintiff and Bernarr Macfadden.

[10] As previously observed, plaintiff, pursuant to the agreement, was to bear three-tenths of the costs of maintaining the home. Yet Macfadden or his corporations including defendant, Foundation, paid all the taxes and carrying charges until 1954. This voluntary payment constituted a waiver of the contributions which plaintiff was to have made, but it does not relieve plaintiff from the future performance of her obligations under the agreement, nor does it discharge her obligation as to the items presently in default. *McCrory Stores Corp.* v. *S. M. Braunstein, Inc.*, 99 N. J. L. 166, 168 (E. & A. 1923). Thus, a judgment will be entered directing the Foundation to pay 70% of the taxes and maintenance charges of the property now due and to grow due as provided by the agreement. The defendant estate of Bernarr Macfadden, will be directed to pay 70% of the aforesaid taxes and carrying charges in

accordance with the contract in the event that the Foundation defaults in the payment thereof.

Additionally, the judgment will provide that the title of the Foundation to the Englewood property is subject to plaintiff's right to use and occupy the same for life in accordance with the aforesaid agreement, and the defendants shall be enjoined from interfering with or disturbing plaintiff's possession. If plaintiff should for any reason not be permitted to use the home in Englewood, the estate of Bernarr Macfadden would be required to provide plaintiff with a home under one of the alternative provisions of the agreement. With respect to this contingency, however, judgment is reserved until the situation calling for relief arises.

Judgment accordingly.

APPENDIX "F".

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-56-57

MARY MACFADDEN,
Plaintiff-Respondent,

vs.

BERNARR MACFADDEN, L. ARTHUR ST. PHILLIP and BRAUNDA M. ST. PHILLIP, his wife,
Defendants,

and

BERNARR MACFADDEN FOUNDATION, INC., a Membership corporation organized pursuant to the Membership Corporation Law of New York,
Defendant-Appellant,

and

EDWARD F. BODINE and PAUL WINKLER, Executors of the Last Will and Testament of Bernarr Macfadden, deceased,
Defendants-Respondents.

Argued March 10, 1958—Decided March 25, 1958.

Before JUDGES PRICE, SCHETTINO and HANEMAN.

On appeal from a final judgment of the Superior Court, Chancery Division, whose opinion is reported at 46 N. J. Super. 242 (Ch. 1957).

MR. GEORGE F. LOSCHE argued the cause for defendant-appellant.

MR. CHARLES B. COLLINS argued the cause for plaintiff-respondent.

Appendix "F"—Opinion of Superior Court of New Jersey, Appellate Division.

Per Curiam: The judgment is affirmed for the reasons expressed in the opinion of Judge Freund in the court below, 46 N. J. Super. 242 (Ch. 1957), supplemented, however, as follows:

Defendant argues that the trial judge erroneously labeled the action as one for specific performance. It must be remembered that it is from the judgment, and not the opinion, that appeal is taken. R. R. 2:2-1; *Hughes* v. *Eisner*, 8 N. J. 228 (1951). The written conclusions or opinion of a court do not have the effect of a judgment. From them no appeal will lie. "It is only what the court actually adjudicates, not what it says in an opinion, that has any direct legal effect." *Suburban Department Stores* v. *East Orange*, 47 N. J. Super. 472, 479 (App. Div. 1957). A judgment, admittedly, cannot be founded on a theory not appearing or raised in the proceedings or pretrial order. *Lertch* v. *McLean*, 18 N. J. 68, 74 (1955).

There are 13 issues detailed in the pretrial order. None of the issues is designated by any recognized nomenclature for types of equitable actions. An examination of the issues results in the conclusion that what the plaintiff actually sought was specific performance, together with auxiliary injunctive relief. The statement of the trial judge that the action was one for specific performance is consistent with the stated issues and the theory upon which the case was tried.

Even though the issue of specific performance was not specifically raised by the pleadings or the pretrial order, where, as here, the matter was tried without the objection of the parties on that issue, it shall be treated in all respects as if it had been raised in the pleadings and pretrial order. Ordinary procedure would call for an amendment of the pleadings and the pretrial order in the event an issue not raised in the pleadings and pretrial order was tried by consent or without objection. In the light of the fact that this

matter was tried without objection on the issue of specific performance, defendant may not now be heard to complain. R. R. 4:15-2; *Colozzi* v. *Bevko, Inc.*, 17 N. J. 194, 203 (1955); 2 *Schnitzer & Wildstein, New Jersey Rules Service*, 386.

Defendant also makes some comment concerning the absence of fraud in connection with the piercing of the corporate veil of Bernarr Macfadden Foundation, Inc.

In *Irving Investment Corp.* v. *Gordon*, 3 N. J. 217, 223 (1949), the court said:

> "It is where the corporate form is used as a shield behind which injustice is sought to be done by those who have the control of it that equity penetrates the veil."

That statement connotes merely that there must be equitable fraud present to permit of such action. Fraud, in the sense of a court of equity, includes all acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. *Howard* v. *West Jersey &c., R. R. Co.*, 102 N. J. Eq. 517 (Ch. 1928), aff'd 104 N. J. Eq. 201 (E. & A. 1929); *Riverside Trust Co.* v. *Collin*, 114 N. J. Eq. 157 (E. & A. 1933). Plainly, the facts sustain the conclusion that the use of the corporate form is here fraudulent in the above sense.

As to defendant's argument that it should not be liable for repairs to the premises involved, it must be observed that from 1932 to 1953 the cost of repairs had been assumed by it. This action constituted a contemporary construction of the agreement of April 7, 1932.

Where the parties to a contract have given it a practical construction by their conduct, such construction is entitled to great if not controlling weight in determining its in-

terpretation. *Kingston Trap Rock Co.* v. *Eastern Engineering Co.*, 132 N. J. L. 234 (E. & A. 1944); *Washington Construction Co., Inc.* v. *Spinella*, 13 N. J. Super. 139 (App. Div. 1951), aff'd 8 N. J. 212 (1951).

By a bill of complaint filed on May 9, 1933 in the then Court of Chancery in an action between Mary Macfadden and Bernarr Macfadden, plaintiff prayed for the following relief, *inter alia:*

> "2. That an account may be taken of the sums of money expended by defendent in the cost of upkeep, expense, maintenance and support, including rent, 'and/or' carrying charges of the home provided by the defendant for the complainant and the respective proportionate amounts of such expenditures which should have been paid by the complainant and defendant determined, and a readjustment be made, and the defendant ordered to account for and pay to the said trustee for the benefit of complainant all moneys improperly charged against her.
>
> 3. That the said Bernarr Macfadden may be compelled by the decree of this court specifically to perform the said agreement with complainant, and to pay to the said trustee for the benefit of the complainant or to the complainant direct, the moneys by said agreement due the complainant, with interest from the time they ought to have been paid."

A consent final decree was entered on June 20, 1934 which contained the following provision:

> "ORDERED, ADJUDGED AND DECREED, by the Honorable Luther A. Campbell, Chancellor of the State of New Jersey, that a certain agreement heretofore made between the said complainant, Mary Macfadden, and the said defendant, Bernarr Macfadden,

and dated April 7, 1932, a true copy of which is attached to the bill of complaint herein, be specifically performed and carried out by the said Bernarr Macfadden, in accordance with its several terms, up to the date of this decree; and it is further

ORDERED, ADJUDGED AND DECREED that the said Bernarr Macfadden, within 15 days from the date hereof, do pay to the said complainant, Mary Macfadden, or her solicitors, the sum of $13,500.00, the amount agreed to be due by him to her as of the date hereof, pursuant to the terms of the agreement between them heretofore referred to and dated April 7, 1932; * * * "

The statement of Judge Speakman, in *Public Service Elec. and Gas Co.* v. *Waldroup*, 38 N. J. Super. 419, 425 (App. Div. 1955), is apposite. There the court said:

"* * * It is a fundamental rule that facts and questions in issue in an action and there admitted or judicially determined are conclusively settled by a judgment entered therein, and such facts or questions become *res judicata* in all subsequent litigation between the same parties and their privies. Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289 (E. & A. 1898); Middlesex Concrete, etc., Corp. *v.* Borough of Carteret, 35 N. J. Super. 226 (App. Div. 1955)—as to a related aspect of the same case, see 36 N. J. Super. 400 (App. Div. 1955), certification denied 19 N. J. 383 (1955), and 19 N. J. 384 (1955); 30 Am. Jur., Judgments, sec. 178; 50 C. J. S., Judgments, § 686. This is known as the doctrine of collateral estoppel or estoppel by judgment and is to be distinguished from the doctrine of res judicata, which is that in any action on a cause previously litigated by the same parties or their privies, a general judg-

ment in the prior action is considered a finding against the party affected on all grounds that were or could have been raised therein. Kelly *v.* Curtiss, 16 N. J. 265 (1954); Middlesex Concrete, etc., Corp. *v.* Borough of Carteret, supra; 30 Am. Jur., Judgments, secs. 161-177, and cases cited therein.

A judgment by consent is presumed to be entered in the light of all the existing circumstances of the litigation. Although such a judgment is considered a contract of the parties acknowledged and sanctioned by the court, it is regarded as an adverse judgment and is conclusive and effective as an estoppel to the same extent as though entered after a full trial. Fidelity Union Trust Co. *v.* Union Cemetery Association, 136 N. J. Eq. 15 (Ch. 1944), affirmed per curiam, 137 N. J. Eq. 455 (E. & A. 1946) and 137 N. J. Eq. 456 (E. & A. 1946); Middlesex Concrete, etc., Corp. *v.* Borough of Carteret, supra; 31 Am. Jur., Judgments, sec. 458; 50 Am. Jur., Judgments, sec. 705.

* * * the authorities previously cited herein, as well as innumerable others, hold either expressly or by necessary implication that a fact or question has been litigated if it has been put in issue by the pleadings and a judgment by consent has been entered thereon. Such a judgment constitutes an adjudication on the merits."

The question of the liability of Bernarr Macfadden for "upkeep, expense, maintenance and support, including rent 'and/or' carrying charges of the home" was adjudicated. That is a necessary implication of the consent judgment referred to above.

Defendants allege that the agreement of April 7, 1932 is "illegal" since it is an agreement to pay alimony and

that the estate created by that agreement was therefore void *ab initio.*

We are not unmindful of the principle relating to agreements for the payment of alimony as enunciated in *Apfelbaum* v. *Apfelbaum,* 111 N. J. Eq. 529 (E. & A. 1932), and the numerous decisions which follow that leading case. See *Harrington* v. *Harrington,* 142 N. J. Eq. 684 (E. & A. 1948) and the cases cited therein.

It must be remembered, however, that contracts between husband and wife, other than for alimony, although void at law, are enforceable in equity to the extent that they are equitable and fair. *Raymond* v. *Raymond,* 39 N. J. Super. 24 (Ch. 1936); *Van Inwagen* v. *Van Inwagen,* 4 N. J. 46 (1950); *Bendler* v. *Bendler,* 3 N. J. 161 (1949). Where, as here, a contract which concerns a property settlement between husband and wife, unless unfair and unjust, should be enforced. The agreement here sued upon is not one solely for alimony. The plaintiff, in consideration of the granting of the life estate, discontinued a suit then pending in the Supreme Court of the State of New York and assigned and transferred certain shares of stock in Macfadden Publications, Inc. to Bernarr Macfadden. We feel the agreement "ought to be enforced in equity as part of what seems to [us] a fair and equitable property settlement by the parties in other respects fully executed to the considerable benefit of the husband." *Raymond* v. *Raymond, supra* (39 N. J. Super. at p. 31).

Generally, in order to rescind a contract, the party seeking such relief must proffer the return of the consideration received by him. *Green* v. *Stone,* 54 N. J. Eq. 387 (E. & A. 1896); *Dancer* v. *Erb,* 142 N. J. Eq. 422 (Ch. 1948). Defendants make no offer to place plaintiff in *status quo,* nor is it conceivable how they could possibly attain such a result.

Judgment affirmed.